

IN THE HIGH COURT OF SINDH KARACHI

Present:

Mr. Justice Muhammad Ali Mazhar

Mr. Justice Adnan Iqbal Chaudhry

High Court Appeal No. 332 of 2014
[Arshad Mahmud and others v. Province of Sindh and others]

Date of hearing : 10-10-2018
Date of decision : 10-10-2018
Appellants : Arshad Mahmud and others through Mr. Muhammad Najeeb Jamali, Advocate.
Respondent 1 : Province of Sindh through M/s Ghulam Shabbir Shah, Additional Advocate General and Tahir Durrani, State Counsel.
Respondent 2 : Shree Ratneswar Maha Dev Welfare Shewa Mandli through Mr. Mukesh Kumar G. Karara, Advocate.

JUDGMENT

Adnan Iqbal Chaudhry J. - The Appellants have assailed the order dated 10-11-2014 passed by a learned Single Judge of this Court in Suit No. 1646/2008 (said Suit) whereby the Respondent No.2 was added as a defendant under Order I, Rule 10 CPC. The Appellant No.2 is the National Academy of Performing Arts (NAPA), a company limited by guarantee, and the Appellant No.1 is an artist and also Director Administration of the Appellant No.2.

1. Vide an agreement dated 23-09-2005, the Governor Sindh, through the Secretary Culture, Government of Sindh (Respondent No.1 - the lessor), is said to have leased the property called the 'Hindu Gymkhana' to NAPA for a period of 30 years for the purposes of promoting the arts and culture of Pakistan. The building of the Hindu Gymkhana is said to be protected heritage under the Sindh Cultural Heritage (Preservation) Act, 1994, and therefore the

lease granted to NAPA stipulated that “..... NAPA shall not make any alterations in the original structure of the building.....”.

2. In 2008, the Respondent No.1 (the lessor) issued notice dated 13-09-2008 to terminate the aforesaid lease (‘termination notice’) on the ground that NAPA had breached the lease condition and violated the Sindh Culture Heritage (Preservation) Act, 1994 by constructing a theatre/auditorium within the plot of the Hindu Gymkhana. The termination notice has been challenged by the Appellants by the said Suit which prays for a declaration that the termination notice be declared unlawful, and for injunction to restrain the Respondent No.1 from acting on the termination notice and from evicting the Appellants. In the said Suit, it is the case of the Appellants that they have not violated the lease condition nor the Sindh Culture Heritage (Preservation) Act, 1994. Vide an interim order dated 03-12-2008 passed in the said Suit, the Respondent No.1 was restrained from giving effect to the termination notice.

3. The Respondent No.2 claims to be a Hindu welfare society, and before it had intervened in the said Suit, the Respondent No.2 had filed Constitution Petition No.D-2267/2007 before this Court *inter alia* against the Respondent No.1 and NAPA to challenge the right given by the Respondent No.1 to NAPA to occupy the Hindu Gymkhana. It was the case of the Respondent No.2 that originally pre-partition, the plot of the Hindu Gymkhana was granted for cultural and religious festivals of Hindus; that the building of the Hindu Gymkhana was constructed by the Hindu Community for the Hindu Community, and therefore it should be restored to the them; that depriving the Hindu Community from the Hindu Gymkhana by giving rights therein to NAPA was against the Fundamental Rights of the Hindu minority. It was also alleged that NAPA had demolished certain structures of the Hindu Gymkhana in violation of the Sindh Culture Heritage (Preservation) Act, 1994.

Per the Respondent No.2, it came to know of the said Suit and of termination of NAPA's lease of the Hindu Gymkhana from NAPA's reply in C.P. No.D-2267/2007 and therefore on 23-04-2009 the Respondent No.2 filed CMA No.4148/2009 in the said Suit praying to be added as a defendant.

4. While the joinder application of the Respondent No.2 was pending in the said Suit, C.P. No.D-2267/2007 filed by it was dismissed vide order dated 25-11-2013 for the reason that the petition involved disputed questions of fact which could not be addressed in Constitutional jurisdiction, and therefore the Respondent No.2 was left to avail remedy before the appropriate forum. The Respondent No.2 appealed the said dismissal to the Supreme Court of Pakistan vide CPLA No.20-K/2014, and on 27-02-2014 the Honourable Supreme Court granted leave to appeal in the following terms:

“Having heard learned counsel for the parties, we are persuaded to grant leave to appeal in Civil Petition No.20-K/2014 to consider whether the Hindu Gymkhana which admittedly is evacuee property could have been given on lease to NAPA; whether NAPA could have been used and defaced in the manner it has been alleged; whether the act of the Government of Sindh of granting lease to NAPA is violative of the fundamental rights provision of the Constitution and whether the impugned order is sustainable in law?

Since some of the issues raised in this petition may be sub-judice before the High Court in Writ Petition No.06/2009 and Civil Suit No.1646/2008 and as the matter is pending decision in the High Court of Sindh since long, we are persuaded to direct the High Court of Sindh to decide both the cases preferably within a month of the receipt of this order. Office shall transmit a copy of this order to the Hon'ble Chief Justice of the High Court of Sindh for information.”

5. All of the above mentioned developments were brought to the notice of the learned Single Judge when the joinder application of the Respondent No.2 in the said Suit was taken up for hearing. The learned Single Judge was inclined to add the Respondent No.2 as a defendant to the said Suit essentially for the reasons that the relief

sought in the said Suit viz., the restoration of the lease of the Hindu Gymkhana to NAPA, affected the Respondent No.2 who was seeking rights thereto for the Hindu Community; and that the leave granting order passed by the Honourable Supreme Court in CPLA No.20-K/2014 had observed that some of the issues involved in the said Suit are common to the said appeal pending before the Supreme Court.

6. The thrust of the arguments of learned counsel for the Appellants was that by joining the Respondent No.2 the learned Single Judge has enlarged the scope of the said Suit. Learned counsel submitted that the said Suit had been brought only to challenge the termination notice of NAPA's lease of the Hindu Gymkhana and no relief had been sought against the Respondent No.2, nor did the said Suit involve rights of the Hindu Community. He submitted that in any case after the dismissal of C.P. No.D-2267/2007, the Respondent No.2 could not have claimed any interest in the Hindu Gymkhana.

7. On the other hand learned counsel for the Respondent No.2 supported the impugned order. Apart from the contention that occupancy rights granted by the Respondent No.1 to NAPA in the Hindu Gymkhana infringe upon the Fundamental Rights of the Hindu minority, learned counsel for the Respondent No.2 submitted that the Hindu Community is entitled to hold cultural and religious festivals at the Hindu Gymkhana but are being hindered by the Appellants and the said Suit; and therefore the Respondent No.2 was a proper party to the said Suit. Learned counsel also placed on record copy of the order dated 09-08-2018 passed by the Supreme Court of Pakistan in C.A. No.16-K/2014 (arising from CPLA No.20-K/2014) which reads as follows:

“After hearing the learned counsel for the parties, it seems that Government of Sindh Cultural Heritage Department needs to take a decision in the matter of providing of alternate suitable space for re-location of National Academy of Performing Arts from the present premises which is Hindu Gymkhana. In this regard, Secretary, Cultural Heritage Department is directed to appear

before the Court on the next date with thorough study in the matter and with a clear cut solution to the issue. What further has to be done with Gymkhana, that will be considered and decided by this Court separately. As requested by the learned Acting Advocate General, Sindh adjourned to a date after two months.

Mr. Nael Keshav, learned ASC for the appellant sates that in September Dewali celebrations in Hindu Religious festivals is going to take place and Hindu community wishes to use the Gymkhana premises. Let the community people approach the Secretary Cultural Heritage who will consider and decide the application in accordance with law.”

8. Adverting first to the effect of the dismissal of C.P. No.D-2267/2007 as urged by the Appellants’ counsel, nothing turns on that dismissal when leave to appeal has been granted by the Honourable Supreme Court against such dismissal, and when the dismissal order itself stated that the Respondent No.2 was free to avail remedy before the appropriate forum. While learned counsel for the Appellants acknowledged that the said appropriate forum was that of a civil court, he contended that the remedy of the Respondent No.2 was by way of a civil suit for cancellation of the lease which the Respondent No.2 never availed and therefore it was estopped from joining the said Suit brought by the Appellants. However in our view, where the matter of termination of NAPA’s lease of the Hindu Gymkhana was already *sub-judice* in the said Suit at the time C.P. No.D-2267/2007 was dismissed, in such circumstances the Respondent No.2 could also seek to join the said Suit.

9. After going through the aforesaid orders dated 27-02-2014 and 09-08-2018 passed by the Honourable Supreme Court of Pakistan in the pending appeal of the Respondent No.2 (C.A. No.16-K/2014 arising from CPLA No.20-K/2014), where the Honourable Supreme Court has itself observed that some of the issues raised before it are *sub-judice* in the said Suit, we do not see how the Respondent No.2 is not a proper party to the said Suit. It is clear that any judgment passed in the said Suit will affect the right/interest

claimed by the Respondent No.2 in the said appeal in respect of the Hindu Gymkhana. Needless to state that such observation is not intended to advance or prejudice the case of any party pending before the learned Single Judge in the said Suit No.1646/2008.

10. The impugned order manifests that the learned Single Judge seized of the Suit has felt that the joinder of the Respondent No.2 would enable the Court to effectually and completely adjudicate the questions involved in the Suit. It is settled law that the prerogative of the Court under Order I Rule 10(2) CPC to add parties is generally not a question of initial jurisdiction of the Court but of a judicial discretion which is exercised in view of all the facts and circumstances of a particular case¹. The learned counsel for the Appellants has not been able to make out a case for interfering in the exercise of such discretion by the learned Single Judge.

This appeal was dismissed by us along with pending applications vide a short order dated 10-10-2018. Above are reasons of the short order.

JUDGE

JUDGE

Karachi
Dated: 08-11-2018

¹ *Ghulam Ahmad Chaudhry v. Akbar Hussain* (PLD 2002 SC 615).